IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71 - 1206

ROBERT BOLIVAR DE PUGH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF AMICUS CURIAE, AMERICAN ASSOCIATION FOR JUSTICE, INC., IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE

Amicus curiae, American Association for Justice, Inc., is a non-profit corporation organized under the laws of the State of Oklahoma for educational and charitable purposes. It engages in conducting general educational programs concerning the first ten amendments to the United States Constitution. It also assists individuals who are financially unable to retain their own counsel. It is interested in this case because it involves the question of an accused's right to assistance of counsel under the Sixth Amendment.

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner's claim of denial of counsel focuses on the hiatus in the application of the Sixth Amendment provision for assistance of counsel. It is clear from the decisions of this Court that an accused has the right to be represented by counsel, even if one must be provided for him. It is also clear that this right may be waived, thereby allowing an accused to conduct his own defense. *Johnson v. Zerbst*, 304 U.S. 458. The Petition for Writ of Certiorari presents a constitutional question, which has never been considered by the Court, vis.: Does the Sixth Amendment right to assistance of counsel extend to pro se defendants requesting advisory counsel? It is the contention of the amicus curiae that appointment of advisory counsel when requested is a matter of right under the Sixth Amendment, and is not as the Court of Appeals held, dependent upon the discretion of the trial judge.

In its opinion, reprinted in the Appendix to the Petition, the Court of Appeals stated:

> "In our opinion the appointment of advisory counsel is discretionary with the trial court . . . abuse of that discretion is to be determined by whether the defendant received a fair trial." A 6, 7.

The court also stated:

> "In some instances it [advisory counsel] may be valuable and in other instances lead to confusion."

If the matter of advisory counsel is discretionary with the trial court, what is to guide the court in the exercise of its discretion? The Court of Appeals has admitted that in some instances advisory counsel may be valuable. How is a trial judge to determine that a particular trial is or is not one of those instances? A trial judge cannot foretell what effect timely advice, or the lack of it, will have on the outcome of a trial; nor

can he know the extent of the defendant's ability to conduct his defense, unless he has previously seen him do so. It would therefore seem that, in practically every case, discretion would require the appointment of advisory counsel.

The Court of Appeals has not provided a guide to the exercise of discretion. It has only said that the fact that a trial was free from reversible error indicates that there was no abuse of discretion. This test for abuse is really an admission that there is no way to ascertain the prejudice caused by the denial of advisory counsel. To test for abuse of discretion, the appellate court simply goes ahead and looks at the claimed trial errors (A7), the same thing it would do if there had been complete representation by counsel. The fact that there are no reversible errors in a trial, does not mean that the defendant did not suffer from the absence of advisory counsel. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, 315 U.S. 60, 76.

The reason for recognizing the right to advisory counsel is obvious, it being the same as the reason that underlies the right of an accused to be heard by his attorney. In *Powell v. Alabama*, 287 U.S. 45, 69 it was stated:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one."

As to the contention that advisory counsel might in some instances contribute to confusion, the same can be said of the conventional attorney – defendant relationship where defend-

ants sometime want to take part in the proceedings. In either event, the trial judge has ample authority to stop the confusion before it can really get started. Also, the fact that a pro se defendant has requested advisory counsel, would seem to indicate a desire on his part to follow correct legal procedures.

There is no logical reason for the "all or nothing at all" approach to the right to assistance of counsel followed by the trial court in the instant case; however, there is some authority for the position. The Court of Appeals in its opinion (A6) stated, "The Courts have found no constitutional violation in the denial of advisory counsel. Lee v. State of Alabama, 5 Cir., 406 F2d 466, 469, and cases cited at n. 6." In the *Lee* case, the defendant did not make a definite request for advisory counsel, but only indicated that he would be willing to discuss the case with "any competent agent or go-between designated by the Court." In the instant case, petitioner made a definite plea for advisory counsel. In footnote 6 of the *Lee* case, the Court of Appeals for the Fifth Circuit, cited its earlier decision in *Shelton v. United States,* 5th Cir., 205 F2d 806, wherein the following colloquy occurred between the defendant and the trial judge:

> Defendant: ". . . I would like to know if it is possible to appoint amicus curiae to assist a defendant representing himself. It would be of great assistance in preparing suggested charges to the jury, etc. * * *
>
> Court: Let's understand this to start off with. You are either going to be represented by counsel or you are going to represent yourself.
>
> Defendant: Your Honor, what I was asking was not to have a lawyer say a word in the court room merely to have him advise me during the trial.
>
> Court: Well, the Court is not going to appoint a lawyer and have him occupy an inferior

> position in the defense of your case. A defendant is entitled to have counsel of his own choice if he can afford to employ one. Otherwise the court will appoint a lawyer to represent him."

The appellate court approved of the trial court's ruling, stating at 205 F.2d 813:

> "We cannot agree with the defendant that the statute [section 1654, Title 28 U.S.C.] was invalid or that the action of the court in declining to permit the defendant to dictate the way in which his case should be tried, deprived him of any constitutional right."

Amicus curiae submits that the trial judge's belief that defendant's request amounted to a slight of the legal profession, was hardly a sufficient reason to withhold advisory counsel, yet this is the type of consideration that can enter in when there is no real guide for the exercise of discretion. The trial judge's concern about placing a lawyer in an inferior position is in marked contrast to the trial judge's actions in *Bayless v. United States*, 9th Cir., 381 F.2d 67, as reported in the Court of Appeals opinion.

> "In the pretrial stage of the [Bayless] case appellant represented himself but retained counsel to advise him on procedure for filing motions, of which he filed many. The court insisted that the counsel be in court during these motion proceedings, but only to give advice if the appellant requested it. Appellant dismissed that counsel prior to the trial. The court gave appellant the opportunity to obtain other counsel, but appellant did not do so. The court then appointed counsel but made it clear that this counsel would participate in the trial only to the extent that appellant desired." 381 F.2d 71.

In his concurring opinion in *Mayberry v. Pennsylvania*, 400 U.S. 455, 467, Chief Justice Burger stated:

"Here the accused was acting as his own counsel but had a court-appointed lawyer as well. This suggests the wisdom of the trial judge in having counsel remain in the case even in the limited role of consultant. When a defendant refuses counsel, as he did here, or seeks to discharge him, a trial judge is well advised – as so many do – to have such 'standby counsel' to perform all the services a trained advocate would perform ordinarily by examination and cross-examination of witnesses, objecting to evidence and making closing argument."

CONCLUSION

If a court is well advised to appoint counsel in cases where it might even be opposed by the defendant, it is difficult to see how a defendant earnestly desiring assistance of counsel can be refused, simply because he proposes to conduct his defense in an unconventional manner. The Sixth Amendment right to assistance of counsel should be generously extended, without regard for form or convention.

WHEREFORE, amicus curiae prays that the Petition for Writ of Certiorari be granted, so that the Court can consider the question of an accused's right to advisory counsel under the Sixth Amendment.

Respectfully submitted,

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